IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JESSICA JONES, ET AL. Plaintiffs, VS. BAIN CAPITAL PRIVATE EQUITY, ET AL. Defendants.	No. 2:20-CV-02892-SHL

TRANSCRIPT OF ORAL ARGUMENTS

BEFORE THE

HON. SHERYL H. LIPMAN

APRIL 24, 2023

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MONDAY

April 24, 2023

THE COURT: Good afternoon.

UNANIMOUS RESPONSE: Good afternoon.

THE COURT: We are here for oral argument in *Jones, et al. v. Bain Capital Private Equity, et al*, 20-2892. We've got a little role call sheet. Let's see where everyone is.

So, for plaintiffs, I've got Daniel Nordin.

MR. NORDIN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

David Seidel.

MR. SEIDEL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

J -- I guess these are -- well, I don't know what order these are in.

Jason Scott Hartley.

MR. HARTLEY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Joseph Saveri.

MR. SAVERI: Good afternoon, Your Honor.

THE COURT: Good afternoon. And are you the one who is primarily going to argue, sir?

MR. SAVERI: Primarily, yes, depending on which way it goes. Also, my colleague, Mr. Seidel.

THE COURT: Okay. Got it.

Richard Paul, III.

MR. PAUL: Good afternoon.

THE COURT: Good afternoon.

Ronnie Seidel Spiegel.

MS. SEIDEL-SPIEGEL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

And Van Turner.

MR. TURNER: Good afternoon, Your Honor.

THE COURT: Hey, how are you, Mr. Turner?

MR. TURNER: All right.

THE COURT: Then we have defense counsel.

Heather Nyong'O.

MS. NYONGO: Nyong'O, Your Honor.

THE COURT: Thank you.

MS. NYONGO: Good afternoon.

THE COURT: Good afternoon.

Matthew Mulqueen.

MR. MULQUEEN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Steven Kaiser.

MR. KAISER: Good afternoon.

THE COURT: Are you primarily arguing or ...

MR. KAISER: I believe I'll be speaking most today, yes.

THE COURT: Okay. Then -- and that's all for Varsity.

Then for Mr. Webb, Brendan Gaffney.

MR. GAFFNEY: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Mr. Stanton.

MR. STANTON: Mr. Webb.

THE COURT: Yes.

MR. STANTON: Good afternoon, Your Honor.

THE COURT: How are you today?

MR. STANTON: Well, thank you.

THE COURT: Good.

Then, U.S. All Star Federation, Mr. Garrison.

MR. GARRISON: Good afternoon.

THE COURT: Good afternoon. How are you?

MR. GARRISON: Fine. And you?

THE COURT: Good.

All right. Let's get going.

So, hopefully, you-all read the order

that I issued and took me at my word, that those are the issues that we're really talking about today. If you just have some burning desire to bring something else up, I will certainly listen. But I really set out the things that I want to know about.

And let me just start by saying -- by indicating the issues that I did. I'm essentially tipping my hand on the Motion for Reconsideration, because I do think we got some of that wrong.

So, the Motion to Strike the class allegations, I think, brings back some of those issues and will allow us to rule on those issues, on the merits, particularly, those issues that we said had been waived for various reasons. So I'm not saying I'm going to rule differently, meaning, I'm not going -- yeah, I'm not saying I'm going to rule differently. Substantively, I'm just saying they're back in the game.

So those issues in particular were the dismissal of competitions and camps, based on this concept of whether they were services instead of products, as well as the issue related to whether the Tennessee Class Action statute prevents a Rule 23 class action. So those are issues back on the table and are outlined in the questions to be

addressed at this hearing.

Does that all make sense?

Anyone have a question about that?

UNANIMOUS RESPONSE: No, Your Honor.

THE COURT: Good.

So I want to just go through the list of the questions that we outlined in the order that sets out the issues to be addressed today. I want to get all my notes straight first, though.

And the first is the -- the first one on my list is this issue related to competitions and camps, whether there is a product somewhere in there. I think we all agree with the law that the statute only covers products, not services.

Plaintiff agree with that?

MR. SEIDEL: Yes, Your Honor.

THE COURT: Okay. So the question is, for competitions and camps, where is the product? And if I conclude that it's somehow some mix of product and service, what does that mean?

So let me -- I think I know what the defense's position on this is.

Let me hear what the plaintiffs have to say first on that issue.

MR. SEIDEL: Yes, Your Honor. Can I approach

the podium or ...

THE COURT: You can argue from wherever you're most comfortable.

MR. SEIDEL: Okay. Good afternoon, Your Honor.

THE COURT: Okay. Hang on one second. If you would, since there are lots of you lawyers in the room, when you start your argument, please state your name first, for the record.

MR. SEIDEL: Yes, Your Honor.

Good afternoon. David Seidel with Joseph Saveri Law Firm on behalf of the plaintiffs.

So I think that you're correct, Your Honor, that the distinction is between products and services. And there are a number of cases that have held that services are not within the scope of the TTPA. And particularly, purely, service-based contracts are not within the scope of the TTPA.

So the ultimate question, I think, that Your Honor needs to address is whether camps and competitions fall within the ambient of products or whether they fall within the ambient of services.

And in this -- our position is that camps and competitions are products. They are products that may be made up of some portion of some

goods and some services. But ultimately, they're both products.

And in particular, for example, competitions, the cheer athletes pay one registration fee for the product of competitions. They're not paying for a higher service, for a professional service, they're paying for product. And that product includes a lot of different pieces, but ultimately they pay one registration fee for a product.

For example, they are paying to get bids. If they win a competition they get bids for other competitions. They're paying for the use of facilities. And it's our position that real estate is a product, not a service. And they're also getting tickets to Disneyland in some cases. And with respect to camps, they're also getting bids to competitions. They're also getting the use of facilities and other -- receiving other goods.

And also, I think it's important to keep in mind as well that Varsity has tied camps to competitions. And so, a big reason why cheer athletes are going to Varsity's camps is because they're getting a certificate. They're getting a certificate that says they can participate in

competitions.

THE COURT: I guess what -- are you really arguing there's a such thing as an intangible product?

MR. SEIDEL: Yes, Your Honor, in the general sense. And I would point to *Sherwood v. Microsoft*. And that's a case under the TTPA, in which the product was software, and the suite of all of the things that come with an operating system in that case. And so ...

THE COURT: But an operating system, I mean, I can -- or whether it's actually a physical disc. It probably isn't anymore. Something gets sent to me that I can maneuver on a computer, and I can see what's happening. It just doesn't feel as intangible as when I -- if I were to go to a competition and cheer and be evaluated or be taught. Those just feel a lot more -- if it's a product it's a lot more intangible of a product.

Can you get anything closer that you would be able to point to to tell me why I consider the competition in the camp's products?

MR. SEIDEL: Yes, Your Honor. I think we can.

And first, though, I would point out that I don't think there's so much of a distinction in the case law between tangible and intangible. I think the distinction is between products and services. And I think there are products that may

be more or less tangible or intangible.

Now, in this case, for example, the use of facilities. So, if somebody were, for example, to fix the price on real estate and people, you know, use real estate, it isn't -- that is a product. It's not a service. And so, here, for example, a big part of camps and competitions are the use of facilities, the use of real estate. And also, they receive goods as part of it.

So ...

THE COURT: But really, okay, let's talk about real estate. Real estate, either you're buying a piece of real estate or even renting and staying there for a long time, as opposed to here, even looking at the lodging and the meals. And so, your equipment, people are going, using those things for a specified period of time and then leaving them.

MR. SEIDEL: Yes.

THE COURT: You don't take any of that with you. And you're right on the "intangible." That was my term. It's my way of trying to get out, what is a product and how do I fit that word to this set of things, and what's a service.

MR. SEIDEL: Yes, Your Honor. And I think that is exactly the right question. But I would

analogize renting real estate, whether it be for a year, two years, or a month, to a similar situation that's happening with competitions and camps. You're renting it for -- or you're paying to participate and use those facilities, renting it for a shorter period of time. But I would analogize those two.

And I think one of the key -- I think the key part in reading the cases is that things that are services and purely services, are excluded. But almost everything else is a product. And I think you can get that from the first Supreme Court case, the first Tennessee Supreme Court case that ruled on this issue, and that's *Standard Oil Co*. And that's at 100 S.W. And at Page 711 they say, "Legislature clearly intended to prohibit trusts, combinations, and agreements affecting all commerce not covered by the federal statute, and upon which it had a right to legislate. It did not intend to stop short of its power or to exceed it."

And now, there are subsequent cases that have excluded, purely, service-based contracts. But I think everything else is a product. And so, in this case it seems clear that camps and competitions are not service-based products, that they are, in fact, products, whether they're bundled in the sense

that there may be certain aspects that seem like services. But when somebody pays their registration fee, they're not paying for the skill of labor that is considered a service in the cases, for example: Waste hauling; three trimming; insurance-based contracts.

And I think in this case these are, when added together, when looked at the whole, ultimately, they are products under the TTPA.

THE COURT: I assume the camps come with some payment for the services of someone who is going to teach the campers.

MR. SEIDEL: That's right, Your Honor.

So I think camps have more of a portion that can be looked at as services, in the case of the camp instructor. Certainly, that's not the case with competitions. And I think what's also key, again, Your Honor, is time arrangement between camps and competitions where ultimately, a lot of campers were going to those camps to get a certificate to go to competitions.

So we're not saying that there are no aspects of camps or competitions that appear service-based. But I think the question is not which aspects are more like services and which

aspects are more like goods. I think when you look at it in the total- -- I think the right question is to look at it in a totality of what's being offered, that participants are paying one registration fee for the entire product. And I think you can analogize this to other similar situations: Going to a movie, I think, buying a ticket to go to Disneyland, which is also included. Those may have some services attached. But I wouldn't qualify -- I don't think it's proper to qualify them as services and, therefore, exclude it under the TTPA. I think, ultimately, they're products.

Thank you, Your Honor.

THE COURT: Anything else on that point?

MR. SEIDEL: Nothing further, unless you have any further questions, Your Honor.

THE COURT: Let's hear from the defendants.

MR. KAISER: Thank you, Your Honor. I'm going to stay over here, if that's okay.

So, cheer competitions and cheer camps are not bundled visiting services in any sense it matters. And when a team goes to a cheer competition, it depends on registration fees that will be given a slot to compete. It will be judged and sported. So that's the services that are

provided. Everything is a service. Similarly, when a cheerleader goes to cheer camp, he or she pays a registration fee for the instruction that will be provided. It doesn't really sound like there's much of a disagreement about that.

We've heard some things about some ancillary things that come along with competitions, for example, but those ancillary things themselves are all services. Access to the place where you do the competition is completely ancillary, because they need to be judged. In that conception it would seem that they would say, going to a hairdresser or a barber would be a "good" because you get to sit in the seat for the services performed. Going to a doctor's office is a "good" because you get to sit in the waiting room for some period of time and maybe you get to use the doctor's office's bathroom, which is another example they used in their brief.

And I don't think anyone would say that those things are goods. Those are services. The services are provided. Everything else is ancillary to those services being provided. And the Courts have looked at this issue all the way back to the Tennessee Supreme Court in that McAdoo case. And that case involves an indirect dependent conduct in

the word of construction contracts. And the contracts, of course, had the management of construction, which was considered a service. And that was really where the anticompetitive conduct was alleged. But, of course, whenever you build something there's a whole lot of goods that go on with that. You've got drywall, and concrete, and pipes, and all that sort of thing.

And the Court distinguished between those two things and said, yeah, that's true, but this is about the service. This is about the service of constructing and contracting, therefore, the TTPA does not cover that.

THE COURT: Well, here, isn't the plaintiff's position all about the bid and what their allegations -- a big part of their allegations focus on that the bid that comes out of these camps is part of what they find the defendants have done wrong here, and that that is the -- because that's the essence that comes out of the camps, just like, the management of the construction project was the essence of what they were challenging there, that that's something that does lead to a product.

MR. KAISER: Okay, so, let's talk about bids for a second.

So they said that, well, at some

competitions, some competitions, you know, we're of class here. Everything's in play, right. But they're focusing on little examples.

But in some competitions you can get a bid to another competition. And I'll talk about camps in a second. But that's kind of terminological, right. That's sort of circular world. But then if the registration fee to the competition is a service in the beginning -- in the first place, getting another registration fee paid, if that's what the bid means, that's just getting a service paid for. So it's service on service.

THE COURT: If the competition is a service.

MR. KAISER: Right, right. So it sort of doesn't really change that dynamic.

Now, in camps, far be it for me to characterize what they said about camps. But I believe what they're saying is that a few Varsity competitions, and this is just a few, require you to attend and receive a credential for safety and other things at a Varsity camp. So, in other words, if you want to go to the competition you have to go to the camp. I think that's what they're saying.

But, again, that's not even receiving -- that's just receiving access to the competition.

That's not receiving a bid for the competition or getting your registration fee to the competition. That's just a qualification you have to meet to be eligible to compete in the competition. And, again, it's a very small sliver of competitions that have this requirement, typically, very high-level competitions.

THE COURT: Well, some of that answer though goes to one of my issues here. You know, I realize a lot more has happened in this case beyond the Motion to Dismiss stage. But this is a Motion to Dismiss.

MR. KAISER: Right.

THE COURT: So there may be a lot of explanations for the details of what all this means, ultimately, but at this stage I've got to treat it as a Motion to Dismiss.

MR. KAISER: Absolutely.

THE COURT: So, what does that -- should -- listening to plaintiff's position that they contend these are products, you know, shouldn't -- why shouldn't I let it go forward as to the Motion to Dismiss to see what else is going to happen probably tomorrow, as we start looking at the next stage of the motions?

MR. KAISER: Your Honor, there's several

reasons. First of all, of course, Quimbee requires it to be plausibility to what they're saying.

THE COURT: Sure.

MR. KAISER: It's a narrative of facts behind what they're saying.

THE COURT: Sure.

MR. KAISER: So they say, six paragraphs in their complaint to you -- they sent you six paragraphs, specifically, Paragraphs 47; 51; 63; 74; 184 and 213.

And I would absolutely urge the Court, as I know it will, to go and look at those six paragraphs. They say those are the paragraphs in the allegations that they want to go forward, based on.

So, Paragraph 47 describes Varsity's business. It doesn't say anything about goods. It just talks about what Varsity does as a business.

Paragraph 51 sort of makes the point we're trying to make as to competitions. It says, "Participants pay to complete, including fees for events, USASF registration fees, music licensing and insurance." So that's -- every one of those seems to us, anyway, is clearly a service.

And then they say, "Participants pay substantial sums to Varsity for associated goods and

services, as set forth herein." And what they're getting at there, I think, tends -- they talk about associated goods and services tends to be apparel. But, again, that's paid separately. So it's not part of the -- it's not part of the registration fee. It's a separate thing that they may or may not purchase from Varsity and from someone else.

And it's sort of a little bit -- and, you know, they talked a little before about Disney tickets and I just want to touch on that for a second.

A Disney ticket is access to the park. You get to go into the facility and you get to ride the rides and you can see the shows. You don't get to take anything home with you. Believe me. I was just at a Disney park and I can assure you, you get nothing, except access to the park. If you want to bring something home with you, you have to take out your credit card and buy that something, whatever it is, a T-shirt or Mickey ears, or whatever.

So, when they say, Disney tickets, when they say associated goods are goods, they're talking about things that were purchased separately from the registration. And they can bring a case based on those things. And they have. They have an apparel

claim, such as this. And that's not at issue today. But when they try to say there's some sort of good that comes with the registration fee when they don't point to anything that you actually have at the end of it, other than the experience of having gone to the competition, which is certainly not good, it doesn't get there. And, again, these are their allegations.

Just to run through the rest of them, 63 sort of goes the same place with the camps. It says -- speaking of camps, it talks about, after you get instructions, so forth, and all these services that were mentioned before, it talks about, "Varsity-promoted Cheer Camps operate as a showroom and sales platform for Cheer Apparel and other income streams."

So, again, by their own allegations here, you can see that these are separate purchases. You're not buying any of these things that might be offered to camps, unless you choose to, like in this showroom sales platform.

The other three -- 74 is, again, about camps. It doesn't say anything about goods being put in the registration fees.

184 is about competitions and it talks

about bids. So we're back to that issue.

And then, 213 talks about all the things you need to run a camp, which isn't exactly the same point. But what -- it speaks of facilities; instructors; coaches; assistants; choreographers; support staff; medical staff; liability insurance; and availability of equipment.

So, again, none of these things suggest tangible products. And if "tangible" doesn't rub people the right way, it doesn't suggest a physical thing. Instead --

THE COURT: Does it -- I guess that's the question. Does it have to? Does a product have to be a physical thing?

MR. KAISER: I think a product has to be something that you take with you. It can't just be a memory or transitory access to something, because those are quintessential services. But I guess what the Supreme Court had in mind when it talked about, for example, in the Freeman Industries, which is a more recent case from the Tennessee Supreme Court, it talked about the purposes of the statute of the TTPA, were to preserve free and fair competition from the sale of merchandise that become a part of the massive property in this thing.

And also, the second thing it said, it was to preserve free and fair competition in the manufacturer and sale of articles of domestic growth and domestic raw material. That's the Supreme Court of Tennessee speaking in 2005.

So I think that answers the question of, what are we talking about here. We're talking about merchandise. We're talking about the massive property. We're talking about articles. We're talking about raw material. None of the things they're talking about are any of those things. And all of the cases that are cited, including, I would add, several cases that they say are all about, to the extent there's an intangible or a good involved or something involved, they all have said, no, that's not -- that doesn't get you there.

So, for a case like Amodeo, which is a case that they cite. This is 2009 Westlaw 736656, Tennessee Court of Appeals (2009). This is a case about chiropractors and chiropractor services. And the chiropractors came and said, well, wait a second. We sell these things with these services. There's, it said, 43 different products, I think they said: Ankle support; cervical collars; and so forth.

And the Tennessee Court of Appeals rejected that argument. And it said, "To allow such a claim, would expand the TTPA beyond the scope intended by the general assembly and allow claims under the TTPA whenever a primarily-serviced industry provides a product ancillary such as service."

And there they were talking about physical things that the folks took home with them. And there, truly, is another one that they cite (2008) Westlaw 2510581, also from the Tennessee Court of Appeals, 2008. And this had to do with tree services, you know, basically, landscaping. And there the argument was, well, to do the landscaping they have to apply herbicide and they put the herbicide on the plants. So that's a good. And the Courts said, no, that's not right at all. They said, that's just ancillary to the service reference, so therefore it doesn't count.

THE COURT: How do I fit the real estate example into your outline of what it means, what a product means?

MR. KAISER: Yeah, so, I think real estate is an interesting point. If we're talking about fixing the price of real estate to be sold, there might be a

discussion, because you might argue that that's a raw material. But when we're talking about transitory access, transitory short-term, not even a legal right to access, facilities such as a venue, a performance venue, or a Disney park, or the seat at the hairdresser, or the barber where you get your haircut, I don't think that would qualify as a good. You don't get to take it with you. You don't have any rights in it. You don't have any legal claim to it, either in the short-term or permanently. You can't sell it to anybody else. It's just literally a brief time right of access to a space to basically have services performed for you.

So, I mean, I think if you start going down that road, like, sort of very short-term access to real estate, then all these other cases just fall away. There's really nothing left at that point. And I think the courts in Tennessee, at least, have counseled not to go down that road. That's not the road that the TTPA is suppose to go down, or the general assembly.

THE COURT: So, to you, a good and a product is the same thing, right? A good -- something has to be -- well, if something is a good it's a product. A physical thing.

MR. KAISER: I think that's right. I think it

has to have some physicality or at least some permanence there. It can't just be some transitory access to a room or to a facility or something like that.

I mean, one of the examples that caught our eye was, they talked about going to a theater or a concert. They said, well, you get to go use the bathroom, and that's a product. Using the bathroom is a product. Well, I mean, it's not as if you get to take the bathroom home with you. You can't take the sink and cart it out of there. You have to leave everything the way you found it.

And so -- and, again, in terms of bids on the incident- -- incidentiality [sic] and the fact that nothing they talk about has anything to do with these ancillary things that they're calling products. They're not saying that we did something to fix the price of venues, or to fix the cost of going to the bathroom at some point. They're not saying that at all. They're talking about the poor service that was provided at the camps, and separate the competitions.

THE COURT: Thank you.

Mr. Seidel, first, the full side of that Standard Oil case. Do you have the full cite of that?

MR. SEIDEL: Well, I apologize. What -- which case, Your Honor?

THE COURT: The Standard Oil case that you mentioned.

MR. SEIDEL: Yes, Your Honor. That's 100 S.W. at 711 was the --

THE COURT: Pinpoint.

MR. SEIDEL: Well, yeah, it was pin cite from the quote that I gave the Court.

THE COURT: Okay. And then, any response to what Mr. Kaiser has said?

MR. SEIDEL: Yes, Your Honor.

So, first of all, I think the discussion from Varsity makes clear that this is a factual issue that should be addressed, possibly, at summary judgment. For example, what is -- what cheer athletes are paying for with a camp, with their registration fee, for example, a registration fee for competition, and all the things that they get, and what they are ultimately getting from that fee, that goes to the issue of whether it's a product or

whether it's a service.

Now, I don't -- I haven't heard anything from defendants saying that a competition is somehow a service in line with the cases that they cite. So, for example, in McAdoo, that was a case about a construction service. And the Court specifically said that the reason that the plaintiff didn't get the bid, it was because the defendants felt they weren't skilled enough. It had nothing to do with building materials. That was purely a service-based contract.

Same thing with Amodeo, the chiropractor services case. So, the plaintiffs in that case alleged a conspiracy in chiropractor services. And one of the defenses was, well, we also sell other products, but that wasn't an issue in the case. The plaintiffs didn't bring a claim alleging that products were increased.

And so, ultimately, defendant's position is that, essentially, everything is a service unless it's a raw material or good. So, according to defense -- I mean, and that goes far too far. So, for example, a ticket priced to an NBA game, according to them, it's a service provided some skill to you, consistent with these cases. And we

don't think it is.

THE COURT: Well, we hope there's skill involved on our part, but not always --

(Simultaneous, unreportable crosstalk.)

MR. SEIDEL: Certainly some skill --

THE COURT: -- that's a Saturday night thing.

MR. SEIDEL: Certainly, some skill involved. But I think when you look at going to an NBA game or a sports game, it's not a service that's being provided. It is a product. Ultimately, the entire package that you're getting is a product. Again, according to defendants, any use of real estate is a service, because you're allowing somebody to have possession and use of real estate. And I don't think that's correct. And I don't think that's supported by the case law.

And the only other thing I think I would say, Your Honor, is that I think defendant's position takes far too narrow a view of what the cases say, and essentially are asking Your Honor to hold that the TTPA only cover goods and raw materials, and everything else is a service.

I think it's a better read of the cases, that there are products which are a combination of multiple things, and then there are purely service-based issues, and those service-based

contracts are not within the scope of the TTPA. And I do think, though, that a factual record will help clarify whether this is a product or a service. But I think it's clear it's not a service.

THE COURT: Is there case law support that an NBA game is a product?

MR. SEIDEL: No, Your Honor. That specific facts have never come up in the courts.

THE COURT: Mr. Kaiser, I'm assuming you would say, no, it's not a product.

MR. KAISER: A ticket to an NBA game, no, I don't think that's a product. I think that's a service. It's a license to go sit in there and see what they're entertaining. And the entertainment is a service.

So I think you have to look at the -- what the customers are getting and what they're getting -- why are they coming to a varsity competition? It's not something they can go inside the Georgia Congress Center or in the arena in this area to sit in the arena for the pleasure of doing it. They're there to be judged. They're there to perform. They're there to have the opportunity to sport, and perhaps, enter mid-southern competitions,

for sure, which, again, are just further services.

So, yes, I would certainly say a ticket to an NBA game is not a good, it's a right to achieve a service.

I guess one thing I would -- there's another case that I'll just touch on real briefly. It's a case having to do with ATM cards. And in this case the issue had to do with how ATM card transactions were processed. And the Court said, well, that's a service, earlier, at least their argument was, that's a service. And the Court said, well, no, you're giving everyone an ATM card, so that's a product (mumbling) -- physically, you get to take it home with you. And the Court said, well, all the ATM card is a means to access the service you get when you use an ATM machine. And that's exactly, essentially, what we're talking about here with the NBA example if there are other examples. And that case, by the way, is *Bennett vs. Visa*, 198 S.W.3rd 747.

And the only other thing I'd like to say is the Serenelle (phonetic spelling) case that they mentioned is a very old case and was very general, and not really dealing with this issue. By far, the more on point cases are McAdoo, which Quimbee Court

has looked at these issues, cites for these points.

And then, I would also argue Freeman, in the light of dubious -- which is used to describe the purpose of the statute that was passed before the Court, which is really what the Tennessee Supreme Court has ruled on.

THE COURT: What about a response to Mr. Seidel's point that, really, we should -- I should let it go forward as a matter of a Motion to Dismiss, because the actual record should be developed if they've alleged that there are products involved in the various markets. And thus, I should let it go goin' forward at this stage.

MR. KAISER: Well, I think they've already kind of indulged themselves on that, because in the papers that they filed in August of this past year, after discovery was closed with the fuller band and everything that was ever going to come out of discovery, including things that they said they learned in discovery. So, for them to now say, well, there's other things -- stuff we can put forward, we've done away with not identifying, other than the Disney thing, which we've talked about. It seems to me that we just keep kicking the can down the road, in a case that really, with all respect, we're getting the part of the can -- we're kicking things down

the road.

Things that can be decided, I would submit, should be decided. We read the allegations in their complaint. They had the full discovery record. They've brought up some other things in their motion in this case. If the Court wants to consider them as a third in the complaint, I don't think we'd have an issue with that. But to say, well, let's just, again, let this go, based on something that they don't identify that may have happened in discovery, I would assume that that's not correct. As a formal matter, it's certainly not correct. It's the Court's prompting, Quimbee, that requires the allegations, again, in the complaint.

THE COURT: Right. I mean, the complaint has to hold up, but I'm hesitant to not kick the can, if kicking the can is appropriate.

MR. KAISER: Yes, I understand.

THE COURT: I've kicked enough cans in this case. I don't really -- you know, I don't relish kicking more. But I still have to respect the procedural posture of where the Motion to Dismiss is. And I understand your position is to -- making sure I also apply the right law at the Motion to Dismiss stage, because and I'm hesitant to look ahead and say, well, they don't, you know, after

all this has been briefed, they still didn't cite anything. I can't really look to that.

MR. KAISER: Well, I suppose, you know, we were asked to come here today to address this factual point. They do have the benefit of full discovery, and the one viewpoint I think I brought up was the Disney ticket point, and, obviously, you have our position on that. But I don't know that there's anything else that they could bring up if they tried.

THE COURT: Okay.

MR. SEIDEL: So, a couple brief points, Your Honor.

THE COURT: Brief.

MR. SEIDEL: First -- yes, it's not that we need more discovery. It's that we haven't had an opportunity to brief this issue. And so, when this issue is ripe for us to brief and put in the facts that we have in discovery, I think that's the most appropriate time. So I wouldn't say it's, "Kicking the can down the road," I thinks it's putting it in the correct posture, which is, it's a factual issue. We need to be able to brief the issue with the facts.

The other thing I would say, Your Honor, it's not just us that say that this is a bundle of goods and products. They admitted it at ECF 56 at

the end of their introduction. This is page 2. They talk about how it's a bundle of products and services. And so -- and that's all.

THE COURT: But did they say that in the context of all of these markets or just, if you, you know -- because one market, we've said it's products. We've said "apparel" or "product."

MR. SEIDEL: Yeah.

THE COURT: So, was that statement made in the context of looking at all three of these markets?

MR. SEIDEL: That's my understanding. It's a little bit vague, to be honest. It's not specific to apparel. And so, I believe that, yes it was addressing all three of the markets. But it isn't clear. It isn't clear, one way or the other.

MR. KAISER: If I may add one thing, Your Honor?

That's just simply just not right off. When we speak about bundling in this case, they're talking about the allegation of the bundling of competitions. In other words, the rebate program that gives people discounts if they purchase multiple competitions. This is a bundle of competitions. We do not speak in terms of bundling of, you know -- if you buy a competition you get a

good along with the competition. We would never have said that, because it isn't true.

The other scenario where bundling might come up, is the fact that the gyms may bundle a number of different things in their offerings to their customers. So, not our -- not us, but our down -- our customers to the gym, they take our competitions -- you know, when they go to a cheer camp where they say, well, if you come to our gym and pay us "X" hundred dollars a month, you'll get training; you'll get weightlifting; you'll get a uniform; you'll get -- we'll go to six competitions or ten competitions, or whatever. That is a bundle, sure. But that's with the -- gyms, not us, sell the accounts, not -- that's not us bundling or anything, that's what the gyms are selling.

THE COURT: Well, is the -- are the plaintiffs' allegations that, you have done something to lead the gyms to bundle in this way?

MR. KAISER: No.

MR. SEIDEL: But, Your Honor, I think it's important to just read into the record what they said. And also, everything that Mr. Kaiser just said is a factual issue, and so, we should be able to brief these issues on a factual basis. But I'll read -- this is

ECF 56, page 1 from the introduction:

"This includes such disparate items as the registration fees that All Star gyms pay to have their teams participate in All Star competitions." So we know they're talking about the market of competitions.

"Apparel worn at such competitions," market for apparel, and, "Cheer camp registrations, backpacks, spectator tickets, and USASF membership dues."

So what they're talking about there is all three markets. And then they say, "As is self-evident, such a broad combination of products and services can not be encompassed within a single class, especially an indirect purchaser class where assorted combinations of the various products and services are bundled by intermediaries with their own products and services before being sold as bundles to putative class members."

So I think there is a factual issue as to whether these are products and services. I think a more developed factual record is appropriate and we haven't had a chance to brief it on that basis. And I think our complaint is certainly sufficient, based on what we've alleged, as well as the

inferences that Your Honor can draw, with respect to these markets.

And so, ultimately, I think these are products and not services.

MR. KAISER: I would just note the key phrase, they were just "intermediaries," which is exactly the same. An intermediary is not (mumbling) with Jones.

THE COURT: Okay. All right. We're going to leave it at that.

The next issue that I have relates to the Shady Grove issue, the whether the Tennessee's class action bar is substantive in procedure in how it interacts with Rule 23.

Let me start with -- is this you, too, Mr. Kaiser?

MR. KAISER: Yes.

THE COURT: Okay. Let me start with defendant.

How does Rule 23 -- Federal Rule 23 "abridge, enlarge or modify" a substantive right of a -- under the Tennessee law.

MR. KAISER: So, I would start, in response and maybe make this a relatively short response by commending the Court to its own decision in the Motion to Dismiss ECF No. 333 --

THE COURT: Yeah, don't do that.

(Simultaneous, unreportable crosstalk.)

MR. KAISER: At 57, 58, 59 -- well --

THE COURT: I'm not sure I got it right there.

MR. KAISER: Okay. Well, we think you did, quite correctly, and not just in the conclusion, but in the analysis, which is why I really have a hard time intruding on it, in a sense, because it's really exactly what I would say.

In that decision the Court spoke about, "Courts have looked to whether the state law in question applies to all claims, or whether its reach is limited to certain claims, as an indication of whether it substantially impacts state substantive rights."

So the issue in all these Shady Grove cases is, is it a procedural rule, in which case, federal rules apply, or is it a substantive rule, in which case the state law applies over here. And the way this doctrine has come out across the board in many different courts cases, has been questioning whether it's -- whether the law in question is a bar on class action on a particular subject matter, irregardless of the source of law, or whether the bar and practice is part of the remedies in the

various statute at issue.

And here, under the TCPA, it absolutely is the various statute at issue. The TCPA literally, in the section on remedies, it talks about what remedies are available. It says, specifically, right there, no class action.

So, the state legislature has said, we do not want this TCPA, which, after all, is a statute warranty-designed to deal with, shall we say, transactional issues in the market place, maybe a warranty issue or a lemon car or something like that, so that the consumer has some ability to -- some leverage against the counterpart, the vendor or whatever. But not -- but they specifically limited that leverage, so they couldn't do what is attempted when there's a class action, which is bring a bunch of claims together, ruling out that kind of leverage. That was the whole remedial scheme that the legislature adopted, quite deliberately.

And it doesn't apply to claims under some other state's laws, or the federal claims or anything else, which is quit different from that New York statute in Shady Grove, because in Shady Grove, the New York statute said, we're not going to have class actions about wage issues. I don't care if

federal wage issues, or state -- or state of Vermont or whatever. We're not going to have class actions about that in our courts.

And the Supreme Court said, well, that's fine for the state of New York. And their courts can do whatever they want. But in federal court, we have Rule 23, and Rule 23 says we have class actions when the requirements are met.

But Justice Stevens, who, of course, who then supervised the 5th vote in that case, said, well, I agree with that conclusion as to the New York statute. But that doesn't mean that applies across the board, because oftentimes statutes, specifically, when it remedies -- and it's really a remedial scheme that the legislature adopted for the statute at issue in the case that I'm going to be looking at to determine whether it's a procedural rule or a seven -- 8 Rule.

And the Court said, you know, there's all sorts of cases. They cite a bunch of cases, we cite more cases. The Courts have looked at this issue and said, well, if that's the TT- -- I'm sorry, the TCPA in particular, and also as to similar laws in other states that have this internal class action, or they've said, no, you can't --

that's a substantive rule of the cause of action, and therefore they can't be a class action. And that's what the Court -- you know, I won't go through all the things that this Court said about that, when you consider the Illinois class action bar. But it's exactly the same analysis and you end up in the same place. It's just the case of, you know, Tenn. Code Ann. § 4718-109, which is the TCPA. And the provision says, and I quote, "No class action lawsuit may be brought to recover damages for an unfair or deceptive act or practice declared to be unlawful by this part."

So it's exactly the kind of scheme that the Courts have said those class action bars are enforced in federal court.

THE COURT: What's the remedy that's available under Rule 23 that's not available under the Tennessee statute?

MR. KAISER: Well, I think what the legislature had in mind is that class ac- -- when you pas a law that's basically to give individual consumers a certain procedure for getting at consumer protection-type claims, you have breach of warranty, deception, those sorts of things, they need to be individual, because what we don't want is a situation where these things can be

amalgamated and turn into something that they're not, inherently, which is the same grade, if I can say, "Grade" in each claim, like this claim, which is, you know, a quarter of $1 billion.

THE COURT: So, what that means is that rather than provide this procedure for those claims to be brought together, we should say to these plaintiffs who have suffered -- who have allegedly suffered harm, no, you've got to go back and bring your claim individually, and each pursue it individually, which we all know is -- you know, begs the reason why 23 was passed, because those people will never have the ability to address their harm. It's not -- it's not in their economic interest to do it, even though they were harmed. And I'm assuming that for the purposes of this argument. I'm not assuming your client says weren't harmed. Anyway. But ...

So, it seems to me what you're coming back to is that is a procedural rule. It is -- it was a way for the Courts to say, these individuals are never going to have the economic power to be able to bring their claim individually. So we're going to provide a procedure for them to recover the same damages, but we're going to put it in a class action.

MR. KAISER: Well, I think what I'll respond to on that is that this is a judgment the legislature made, which is no class action. And the reason they did it, I think, is pretty clear, which is that they know that when a class action is brought it puts a different kind of leverage against the defendants that has an individual action or not. And I would not necessarily concede that they -- that someone in that position has no right to bring a claim. They certainly could bring a claim. They could bring -- you know, there's all sorts of small claim options, there's also state court options. It's not impossible to bring a claim as an individual. But what the legislature clearly was trying to avoid is exactly what's going on here.

Now, in state court, clearly, they wouldn't be allowed to do it. So the only question is, can they do it in federal court. And this is creating this remedy -- limited remedy by more than nothing, but limited. They were very careful to pack it this way. And that's what the state legislature decided. And that's what the -- all these cases have ruled -- have said, likewise.

So, I understand the Court's point, which is that, in an idea world where, you know, where leverage wasn't a thing and where attempting

to enforce settlements, and so forth, out of people, wasn't a thing. And I'm not saying -- I'm saying this in the abstract. You might reach a different judgment, but that's not what the Supreme Court said. That's not what Justice Stevens said. That's not what these earlier courts said.

It was for a reason, because this TCPA is designed to keep disputes like this manageable, small, resolvable. They don't need to be federal cases. You can go in to small claims court if it's that type of case. You can go in to state court if it's -- if you have jurisdiction, or otherwise, in federal court. You can come in to federal court and do it, if it's a big enough claim. There might even be diversity jurisdiction. But that's the limit. You can't go any further than that, according to legislature.

THE COURT: So -- and if I felt a different way I wouldn't -- the legislature in their infinite wisdom in Tennessee, certainly has the right to say what happens in state courts. So, I'm not questioning that. The question is, was that a procedural statement or was it a substantive statement?

MR. KAISER: I agree that that's the question. I would submit to the Court that, as other courts have

found, it was a substantive statement -- a limitation of how much we're going to let complainants deal with these types of claims under this very particular statutory scheme.

You know, the other thing that TCPA -- a bit of an academic purpose -- TCPA also does not permit antitrust-based claims. So, that has not been an issue in this case. At some point it will be. And I only bring it up to say -- to make certain -- to illustrate the fact that this is not a catchall statute for anything you don't like happening. It's a very specific thing you're dealing with -- a very specific thing, in a very specific way.

And therefore, it's in our judgment -- and we would submit it falls within what Justice Stevens strongly advised as a substantive rule of law under these, as opposed to a procedural rule -- of claims. There just is no such thing as a class action claim under the TCPA.

THE COURT: So, from your perspective the -- I started out by asking what is the remedy that Rule 23 provides that is beyond -- makes it substantive -- well, that makes the bar by the legislature -- turns it into a substantive bar. And I think your answer is that a class

action allows plaintiffs to band together and put pressure on a defendant to sort of force a settlement.

Is that --

MR. KAISER: I think there is forcing settlement, but then there's also the fact that inevitably in class actions, the details start becoming less important and it becomes more of a mass, sort of broad attack. And the idea of the TCPA is to handle very specific things that were not -- in relationship with those one claims -- in other words, as opposed to this broad, sort of brush approach of class actions often take.

So I think that was what the legislature had in mind. They knew that was a problem. In other words, even if the case were to be litigated to a judgment, you have that problem as well.

THE COURT: So it's not necessarily something we can point to that Rule 23 says, you know, there's these type of damages. It's really the overall effect of Rule 23 and what it allows a case to become.

MR. KAISER: I think that's a fair characterization.

THE COURT: Okay. All right.

MR. SAVERI: Thank you, Your Honor. Joseph Saveri on behalf of the plaintiffs.

So, I guess I maybe should just touch briefly on the last bit of dialogue you had with Mr. Kaiser.

I don't think anything about what the Tennessee statute thought about the kind of hydraulic effect of class actions creating settlement leverage is anywhere in the statute, anywhere in the cases. I think that is just made out of the whole cloth.

Rule 23 is a statute -- is a federal rule of procedure that addresses how claims can be brought.

So, let me start with this. I think at a basic level, the question or the distinction between what is substance and what is procedure is relatively straightforward. I mean if the rule is about not what the substance of the claims are, but how the claims are to be brought, then it is a rule of procedure. And that distinction is straightforward. It's common sense. I think it underlies both the opinion written by Justice Stevens and Justice Scalia said in Shady Grove.

I would also say that -- and we'll come to spend a little bit more time on this in a minute, that the bar -- the New York class action bar that

was at issue in Shady Grove is indistinguishable for present purposes from the TCPA bar. There's really no daylight.

I would want to suggest to the Court that there is additional new authority that we would like to bring to the Court's attention that was not addressed in the briefs. There's a series of cases, and I think the most recent Sixth Circuit case is a case called *Albright vs. Christensen*. It's a 2022 Sixth Circuit case, 24.F.4th 1039. And that's a case in which the Sixth Circuit, following a prior Sixth Circuit case called *Gallivan vs. United States* the 943.F.3rd 291. That's a Sixth Circuit (2019) case, essentially adopted and followed the Scalia plurality decision in Shady Grove.

And that -- under that holding, basically, what Justice Scalia said is that if there is a federal rule on point, the Federal Rules of Civil Procedure on point, the federal rule controls. And among other things, he cited the fact that Rule 23 -- when Rule 23 was at issue in Shady Grove, it's a rule of civil procedure. It's been part of the federal rules, I guess, since 1966. There's never been a rule of civil procedure that the Supreme Court has struck down as a violation of the rules'

Enabling Act. So they have been -- and again, the Rules Enabling Act allows the Supreme Court to promulgate rules of procedure, and not rules of substance. So, under Scalia's view, that was enough.

But that holding, which was part of the decision in Albright, which reversed a trial court decision that went the other way, has subsequently been followed in a number of trial courts in the Sixth Circuit. This encourages a case called *Hinton vs. United States*. And I have the Westlaw site, (2022) Westlaw 882157. That was a Middle District of Tennessee case, dated March 24, 2022.

There's another case called *Smith vs. CoreCivic, Inc.* That's (2022) Westlaw 3051226. That's a Middle District of Tennessee case, dated August 2, 2022, in which the Court says that Albright is a published decision, as such binding and controlling precedent for this court.

There's also a case called are *Gray vs. United States*, 556 F.Supp.3d 832. That's a Western District of Tennessee case from (2021).

And most recently there was a Western District of Tennessee case, dated April 4, 2023, called *Goyer vs. Ash*. And that's a (2023) Westlaw

277-6732. I have copies of all of those cases if the Court wants them today. The last --

THE COURT: That last one you mentioned, what was -- Goyer versus -- "Goyer," is that what you said?

MR. SAVERI: Yeah, I wasn't there. I mean, not at the case. And it's G-O-Y-E-R, v. Ashe, A-S-H-E.

THE COURT: Whose case was that?

MR. SAVERI: I -- JTF.

THE COURT: Judge Fowlkes.

MR. SAVERI: And I'm revealing that I come from a far-off district and I don't know -- I don't have -- these aren't as apparent to me as they may be to people who practice in this courthouse. So I apologize for that.

THE COURT: No worries. No worries.

Yeah, I mean, well, certainly, if you brought copies so you don't have to take them back home, I'll certainly take them. We can do that at the end.

MR. SAVERI: Yeah, so, I did. And hopefully I brought enough for everybody who wants to read them, so ...

THE COURT: We can just take one. That's fine.

MR. SAVERI: So the point, Your Honor, is that

they -- all of these cases basically follow these two Sixth Circuit cases, Gallivan and Albright. And basically, if you read them they come up on -- they don't come up under Rule 23. They come up in slightly different context. They come up under the Federal Tort Claims Act. But not to go too far down this rabbit hole, but cases under the Federal Tort Claims Act are treated as diversity cases for purposes of essentially the same thing we're talking. So they're analogous.

Some of the cases have to do with medical malpractice cases brought under state law and there are state requirements about whether affidavits need to be attached.

So, to be clear, I'm not suggesting these are Rule 23 cases, but the point I'm trying to get at is that the Scalia view of this issue, which would say that if there is a federal rule in place and it conflicts with the state procedural -- the rule, then the federal rule controls.

So, that's -- and under that analysis Rule 23 is the Federal Rules of Civil Procedure. It conflicts with the state class action bar. And on that basis, it doesn't apply.

THE COURT: Let me -- your briefing appears to suggest that you don't challenge our holding as to the

Illinois statute. What's your position on the Illinois statute?

MR. SAVERI: Well, Your Honor, I -- with all due respect, and you know it's coming, the -- we disagree with it and we think you got it wrong. But we also don't say that -- I mean, this came up in the other context of whether the claims were broad or conceded. We brought that. You ruled on it. We think you got it wrong. And we think you got it wrong for these reasons. But that's our position.

I would note, Your Honor, that in the context of Illinois, we did have the benefit of these -- certainly, the most recent authorities applying the Scalia decision. But to answer your question, you ruled on it. You went the other way. We think we're right. We think you're wrong. And that's our position.

THE COURT: Okay. And what does any of that mean? The other two states -- I haven't asked Mr. Kaiser this yet, but the other two states the defendants mention that have similar statutes, I guess, as to Illinois, are Colorado and Montana. Do you have a position on those two state statutes?

MR. SAVERI: I don't. So, Colorado and Montana, I think to the extent that they have -- those

are class action bars, they conflict with Rule 23. And so, my position is the same.

THE COURT: Is the same? Okay.

MR. SAVERI: But again, this hasn't been the focus of this particular briefing. It's been on this Tennessee statute.

I would also suggest, Your Honor, maybe this is a theme that's emerging, is that, on a number of issues -- I mean, we're here on motions to dismiss on pleadings that were -- the briefing was completed sometime ago. And I think that this issue, too, along the lines of what we talked about a few minutes ago, is perfectly appropriate for summary judgment. And we --

THE COURT: Not that you're advocating for summary judgment for them.

MR. SAVERI: No, but this --

(Simultaneous, unreportable crosstalk.)

THE COURT: You're saying, considering for summary judgment.

MR. SAVERI: No, Your Honor, I mean, to be abundantly clear, I mean, we think this is a legal issue and we think that to the extent there are Rule 5- -- this could be dealt with under Rule 56. And it would be appropriate to do so. That doesn't mean we think we're

going to lose. We think we're going to win. But it may be, in fact, we'll file the motion.

But a couple other things I would just suggest quickly about this. You know, we cite a case called Restasis. And Restasis was a reverse payment case. And that's a case that I handled, and we handled the class certification. That case was in front of Judge Gershon in the Eastern District of New York. She was, in fact, the Shady Grove Judge. She issued the trial court opinion and she was reversed ultimately by the Supreme Court.

This Tennessee Class Action Bar was in front of her in that case. And she looked at it and found it indistinguishable from the New York Class Action Bar that she originally said was applicable under -- the Supreme Court ultimately reversed. But we cite that case in our opinion. We think her logic on that is compelling.

So, Your Honor, just to come back to the basic point, this statute, right, is not -- doesn't change -- or this rule does not affect the substantive rights of those who have claims under Tennessee state law. We just had a dialogue about whether those claims could be in small claims court or some other court.

This statute or this rule is all about how those claims are to be litigated. And because of that, even under the Stevens view of the world, that shows that this is a rule of procedure. And Rule 23, which has been on the books, which has provided how claims can be brought together since the 1966 amendment to the federal rules, also describes and shows how claims can be brought.

It's not a rule that changes substantive rights. People may think that it does, but that's not what Rule 23 does. It provides requirements and standards and burdens for the plaintiffs and the Court to examine in determining the appropriateness of cases to proceed on a class action basis, as opposed to an individual basis.

So, one other point I would make about Shady Grove itself, that New York Class Action Bar, depending on if you're in the Scalia camp or the Stevens camp, they both agreed that it was -- the Rule 23 should apply, and the state class action bar should not. They came to it in slightly different paths. I'd argue that Scalia here was correct. He got right to it. But they ended up in exactly the same place.

And so, that's the same place the Court

should end up here, with respect to Tennessee.

THE COURT: Thank you.

Mr. Kaiser, let me ask one quick question, because I'll forget it.

MR. KAISER: Sure.

THE COURT: I think the defendant sort of mentioned in passing, although you don't go into it in detail: Colorado and Montana.

Are you -- as Mr. Saveri said, really, the focus is on this Tennessee statute. Is that what your focus is on?

MR. KAISER: Yes, our focus has been on what the Court is focused on, which is Tennessee.

THE COURT: Okay. All right. Go ahead, and whatever you want to respond to.

MR. KAISER: Yeah, so I'll be brief as I can.

So, much of what we just heard from Mr. Saveri is about cases that are not Rule 23 cases. Of course, Shady Grove is specifically about Rule 23. I would submit that Rule 23 is, according to our Supreme Court in Washington, that is treated the way it says in Shady Grove. The fact that in other situations, diversity cases may be handled differently, or different requirements may be treated differently if it's state requirements. It

really isn't germane when you have a Supreme Court case that's kind of right on point.

They also note that those cases that you just cited, said -- I think that last point, were all cases ever available to them when they filed this motion for reconsideration that they chose not to include.

In any event, there was some mention about Justice Stevens and what he said. And right in the beginning of his opinion he says the New York law at issue, the New York civil practices law, annotated, CPLR, is a procedural rule that is not part of New York's substantive law.

Accordingly, I agree with Justice Scalia, that Rule 23 applies to facts of this Court -- of this case. Excuse me. I'm paraphrasing it.

But I also agree with Justice Ginsburg, that there are some state procedural rules that federal courts must apply in diversity cases, because they function as a part of a state's definition of substantive rights and remedies.

So, to say that Justice Scalia and Justice Stevens felt about this -- this ain't right -- I don't think is correct. And I also think

it's important to remember that that was the fifth vote. And every court that has looked at this, or most every court, many courts have looked at this, have said, you know, we have to follow Stevens because he's the only reason the case came out the way it did. If stevens would have come out the other way, you know, there would have been no class actions, even under that New York civil practice rule, which is totally different from what we're dealing with here, which we've already talked about. I won't reiterate.

I'd also note that some cases were cited. There's no more cases that we cite in our brief, other than pages 5 and 6. I won't go through them all, to save everybody's time. But they all looked at this issue, some of which are from other courts in the Sixth Circuit of the District Court. Some of which are from courts in this state, federal courts, including the Western District of Tennessee, the Hamm case, for example.

And all these cases say just what we're saying today. Same thing this Court said before, which is, this is a substantive rule and not a procedural rule.

One other thing I just wanted to mention is

that this issue of where the remedies are. Bearden, which is a Middle District of Tennessee case in (2010), Westlaw 323-9285 said in this Court, "The class action limitation reflects the policy that the proper remedy for violation affecting classic consumers is prosecution by the Attorney General or by the Tennessee Department of Commerce and Insurance, not a private class action."

So, you know, Middle District of Tennessee at least in that case looked at this very issue and came on out that way.

So, I would just submit that this is about the nature of claims that the legislature has authorized, and because that is a substantive rule, and because of that, the class action bar applies under the Shady Grove.

THE COURT: Thank you, Mr. Kaiser.

MR. SAVERI: Your Honor, excuse me. You asked me about Illinois and Montana.

THE COURT: Yeah.

MR. SAVERI: I've had an opportunity to have my recollection refreshed and so --

THE COURT: Okay.

MR. SAVERI: -- you'll see we cite to cases on

page 5 in the Footnote 5 of our brief. With respect to Montana we cite the Toyota RAV4 Hybrid Fuel Tank Litigation. That's 534 F.Supp.3d 1067. It followed Shady Grove and applied Rule 23 instead of the Montana law that I think only applies to individual claims. So that's Footnote 5, Toyota RAV4 Hybrid Fuel Tank Litigation. Again, that's not an antitrust case.

With respect to Illinois, we also cite a couple of cases. The Broiler Chicken Antitrust Litigation case, 290 F.Supp.3d 772, which relies on a Northern California case, which we handled, called In re: Lithium-Ion Batteries Antitrust Litigation (2014) Westlaw 495-5377. That's the Northern District of California, October 2, 2014.

So, again, our position in Illinois and the Montana Class Action Bar says Rule 23 also controls. To the extent you rule inconsistently with that, you know, you've heard our position.

THE COURT: Okay. Thank you.

MR. SAVERI: Oh, I'm reminded that I did tell you that was in our reply in support of the indirect purchaser, plaintiff's motion for class certification.

Thank you.

THE COURT: That's helpful, since I was just looking at that.

MR. SAVERI: Yeah, which was filed May 25th of 2023 -- oh, excuse me. I'm going too fast.

What I just read to you is a footnote in a brief that we have not yet filed yet. Which doesn't change it, right, the facts that -- excuse me, Your Honor -- that -- those are the cases to answer your question. And I think highlights kind of, like, another piece of what -- these briefs were filed sometime ago. We're continuing to address these issues as we go, including in our reply brief, a class certification that's due in six weeks. So, I apologize. I got ahead of myself. I didn't reveal anything confidential. You'll see it in six weeks, but I apologize.

THE COURT: That helps, because I turned to what I thought was Footnote 5 and I didn't see any of that. But the record has your cite, so ...

MR. SAVERI: Thank you. And, Your Honor, if you have seen it already, we would have to have some other kind of conversation about that. I would -- nothing but kudos.

THE COURT: I've not, so ...

All right. Let's move on to the third issue, which is predominance. And let me say here that, really, my focus on this issue is on counting

questions of law, not fact. We are, frankly, struggling with the notion of 30-plus states, however many -- how many states? 37 or 36. A bunch of states. How many do we have all together?

MR. SAVERI: I think you're right, Your Honor. I think it's 37 or maybe it's -- I think it's --

THE COURT: So, somewhere around there.

MR. SAVERI: Yes.

THE COURT: Let's say it's 37 states. And --

MR. SAVERI: And again -- excuse me. Excuse me. I'm sorry.

THE COURT: Yes. Well, so the struggle is, the law in these various states does seem to be different among the states. There certainly are some that, as you argue, follow the federal statutes, but not all. But you've got them all in one class. So how do we deal this through this mechanism?

MR. SAVERI: So, thank you, Your Honor.

So, I think when you consider the issues that you're addressing in these -- in a multistate class action, which asserts claims under the laws of various states. There are, in fact, kind of two ways to think about it. And you actually talked about both of them. One is the predominance issues under Rule 23(b)(2), and then there's a different

kind of set of considerations which have to do with manageability. And the manageability issue has more to do, and I can talk about it in a minute, with how the cases are going to be tried, and how the jury is going to be instructed.

But taking your question that you just asked, which was a predominance question, right, which was about whether these claims involve predominating common questions. And again, under Rule 23, and under the jurisprudence that's developed under Rule 23 since 1966, including a number of Supreme Court cases on this point, we do not have to prove that all issues are common. We only have to show that common issues predominate.

And the -- as many courts have held, particularly, well, cases in the area of antitrust cases, there are literally dozens, if not hundreds, probably not two hundred, but probably in the hundreds of cases which held that common issues of facts in law overwhelmingly predominate. And that's because, first of all, we start from the proposition that common issues include a number of issues that are going to be proved by common evidence. And that's the touchstone. And the issues that are going to be proved by common evidence include proof

of the conduct in this case, what defendants did, for example, in this case, proof of the acquisitions, the mechanic effect of the acquisitions.

THE COURT: Let me stop you --

MR. SAVERI: Yeah.

THE COURT: -- only because, Mr. Saveri, I think I get that part of it.

MR. SAVERI: Right.

THE COURT: And maybe conceptually, I was phrasing it wrong, because to me, those are the issues that -- I don't have as many questions about common issues of fact.

MR. SAVERI: Excuse me.

THE COURT: So maybe it is really what -- the way you've said it, it's the manageability of a situation where the damages were coverable in one state and completely different in another state. Maybe it is the manageability aspect of that that I'm -- that is really what is nagging at me more than that.

MR. SAVERI: So, let's talk about it. I would only say one more thing about the common issues.

So, with the cases held, when they looked at these multistate cases, really the question is, are there issues under state law that

have to do with state claims, which somehow swamp these otherwise overwhelmingly common issues. And so, there is some kind of analysis of how they go together, right, and they're not separate.

But focusing from a purely predominance issue, numerous cases have held that for a variety of reasons, because the state antitrust claims revolve -- the proof of those resolve around the proof of conduct that is common to the defendant, as well as the fact that the State claims, either are directly modeled on the federal cases, they have harmonization provisions, or they are by statute or decisional law interpret in common with federal law that the distinctions that may exist are minor. And we, in connection with our brief, we had submitted, I think it's at Docket 70.1, a chart, which goes through state by state and shows each of those things. So we're not only just saying it, we're showing our work. And so, that shows how and why the federal cases have much more in common.

The same is true federal claims that arise under state consumer protection statutes. The state consumer protection statutes generally require proof of deceptive, unfair, or illegal conduct -- same reasons that the statutes are overwhelmingly

common. There are differences, but those differences are entirely unmanageable.

So let's talk about how the cases are managed. And so, as a number of courts have held, and we cite those in our briefs, the way manageability is dealt with is through jury instructions and through special verdict forms. Because of the things that I just said, the law -- the state claims can be grouped in tranches and presented to the jury through verdict sheets or verdict forms that address each of the elements of the claims.

And, in fact, Your Honor, again, you'll see this in our reply brief. We are going to address this issue and show how this can be done based, in fact, on the experience of other federal judges with these types of situations.

There are cases like Nexium; Lidoderm; Racana (phonetically spelled), which in the last few years have all involved multistate law claims. And these issues after class certification, in connection with trials, including trials to verdict, were addressed by the special verdict forms. We can show those to you, Your Honor. And this is going to be part of our showing on the reply brief.

I think it's important in that context to know that when these -- we are going to rely on the same body of evidence, with respect to all of these claims. When we put on our case we are not going to put on a New York case or a California case or a Wisconsin case. We're going to put on a case and we're going to put on evidence which is common to the class, including evidence of the type I just described, which is largely, the conduct of defendants is going to be about the business records of the defendants, it's going to be the testimony of defendant's executives, it's going to be the testimony of our experts, it's going to be testimony of their experts -- all of that evidence. Like, we're going to rely on common evidence. And we are going to rely on that evidence with respect to each of the state law claims.

And when we close, Your Honor, we're going to ask the jury in a special verdict form to analyze or answer special verdict questions about whether we've established various elements. Because the claims can be grouped, the answers to the questions will resolve claims under various state laws. To the extent there are additional claims, which have additional elements, they can be -- there

will be -- there can be additional special verdict questions.

So, for example, if there is a state claim consumer protection claim has some scienter requirement that others don't. There will be a scienter question. And if the jury answers that in the affirmative, we have established the claim -- those claims.

In the negative, we have -- we will have failed. We can address that on all the additional -- to the extent there is variation, each of those issues can be addressed. And I would say, Your Honor, that you don't have to necessarily believe me on it. You can look at what other federal trial judges have done in this situation. And the path is well-established.

Now, the other thing you should understand is that we have, in our damage methodology, we have calculated damages on a State by state basis. We have calculated them on an aggregate basis for the entire 50 states. We have also done it state by state. So we'll be able to present and show the jury, damages, damage calculations for each individual state.

So if, for example, the jury were to

find, well, there are damages for those that reside in California, but not those who live in Minnesota, we're going to be presenting evidence to the jury, which would allow them to determine damages on that basis.

So, Your Honor, once again, you don't have to believe me. And I would commend -- what I would recommend Your Honor do is, I think these are reported questions, obviously. And these are sticky questions in these cases. And we appreciate the opportunity to ventilate these. If there are other particular issues along these lines, let's have that dialogue. We are going to address these in six weeks.

THE COURT: So, you're -- overall, you're saying, look, this is an issue --

MR. SAVERI: Absolutely, Your Honor.

THE COURT: -- but it's an issue to be dealt with at the trial. It's not an issue that requires, say, a different class definition. It's not an issue that requires subclasses. It's something that really is done as a matter of outlining the work of the jury and how they are to carry out that work.

MR. SAVERI: I want to be clear about this. I mean, at some level, that is the issue that is going to

be presented to you for resolution in the Rule 23 motions.

THE COURT: Okay.

MR. SAVERI: And Your Honor should understand, right. So, one, we do not deny that there are differences of variations of state law. We don't have to win it by proving that. We certainly believe that they are a lot more common than they're not. And as far as I understand, I think that's largely conceded by Varsity.

Now, you are going to be asked to determine under the Rule 23 motion, with respect to predominance, whether there's significant cohesion amongst the class, or that we've satisfied you that we are going to prove our claims, based on common evidence, or that there are sufficiently predominating questions over individual issues. Those are the basic Rule 23 requirements. It's our burden to show that.

And this is case now -- there's been a substantial amount of the discovery. We're going to submit a lot of the records from the case, including the business records of the testimony. We have the testimony of four experts, which we're also going rely on. There are also -- I need to be fair. There are Daubert motions by both sides, saying

there are problems with those. But all of that is part of the Rule 23 analysis. Manageability, which is also a consideration of the trial plan, is also one of those requirements, and we intend to do that.

But to answer your question, Your Honor, we think that Rule 23 will be satisfied. And once you have determined that we're going proceed through summary judgment at trial, the ultimate issue of when we're going to address the manageability issues will be at the time that we -- well, one of them will be at the charging conference where we are going to consider the jury instructions and we're going to consider the special verdict form.

Now, among other things, that special verdict form is not going to refer again to any of the individual states. It will ask them specific questions about what our proof is. And the jury will be asked to make "yes" or "no" determinations, and then, assuming that we've satisfied each element of what the reasonable estimate of damages is.

So, again, Your Honor, I'll just say it for the fourth time. We have briefs coming in in four or five weeks. I am so eager about them, I gave you a preview of it, unnecessarily a few minutes ago, which I hope I don't regret. But

candidly, Your Honor, I do think it's better to resolve and address that issue on a fully-developed record.

Doing it on the pleadings, which is the Motion to Strike, is an odd way of addressing this. I mean, among other things, we're entitled under Rule 12, to all the inferences, because we're the plaintiff that is on the complaint. We've alleged that -- and made sufficient factual evidence to support the findings of predominance, a finding of manageability.

Look, from our perspective, we didn't -- we had a reasonable belief and we had facts we could plead about what this case is. Candidly, we think this case has turned out, from a discovery record, to be every -- all of that and more. We think the evidence in this case is going to be -- will be demonstratively quite strong. And it certainly supports the class certification determinations.

So we would just suggest that we allow the briefing to continue. Frankly, I also benefit from -- it's really good to be in court again on my feet and having this kind of opportunity to talk, because I think it provides for the kind of ventilation of the issues that's required under Rule

23 and the rigorous analysis that the Supreme Court has required. So I think the briefing should continue.

I think the Motion to Strike should be denied as moot, or denied outright, or reserved until we have an opportunity to fully address these issues. And then, if Your Honor has read those, we can come back. And we welcome the opportunity to argue the -- this as a matter -- as a hearing on a motion, but also to present our -- excuse me (banging noise).

We welcome the opportunity to have an evidentiary hearing on those issues to bring our experts here. You will see when you get to the class certification briefing that it is very expert-intensive. And so, we would be happy to bring the experts here. We can put them on direct. We can cross-examine them. Your Honor can ask questions. And in my experience, it turns out to be a very -- it's a much more productive way of getting to the bottom of these issues.

And certainly, the defendant's, I'm sure I haven't convinced them of anything in the last 15 minutes. But they're going to have their opportunity. And I think that's the best way to do

it.

I would -- one thing I'll say and I'll sit down, unless you have other questions. We recently addressed this issue in a federal cartel case called the Capacitor case in front of Judge Donato in San Francisco. On this issue he had something called a "hot tub" where he brought in --

THE COURT: I heard Mr. Donato describe his hot tub process at the MDL conference.

MR. SAVERI: I -- he was very -- well, he was enthusiastic on the way in. And I think he was more enthusiastic on the way out. I think it's fair to say that he found it to be a very productive thing for him siting as a trial judge on a Rule 23 issue.

THE COURT: I think -- yeah, I was at an MDL conference and he described that, which seems odd to call it a "hot tub" process, but that's another issue. It sounded incredibly interesting, and it sounded incredibly helpful.

I don't know about -- I'm not saying in this particular case, but just in general, as a technique.

MR. SAVERI: And -- but I'll just say that the hot tub issue was largely on class cert issues and on Daubert issues. And so, we put that on -- my experience

was certainly anecdotal, because it was a thing to do.

Unless you have other questions, you know, I'll sit down.

THE COURT: Yeah, I think I'm good on this issue for now. Thank you, sir.

MR. SAVERI: Okay. Thank you.

THE COURT: All right, Mr. Kaiser, same focus. I mean, I cut Mr. Saveri off when he was getting into what the proof will show about what they think the defendant's conduct was, because I see common issues there. To me, that's not the issue. The issue is how to deal with the fact that these states have different laws.

MR. KAISER: Yes, I appreciate that. I will not talk about whether or not there are common issues.

THE COURT: And let me say, I know you disagree with that, but you've got to give it up on that, for me, for now, under this motion.

MR. KAISER: I understand.

And I think, in fact, that's actually the right way to think about it for purposes of this motion. What we're really talking about is, you-all said 37. I think we counted 33. There may be some of those jurisdictions that were part of the Motion to Dismiss. But anyway, it's more than 30.

And one thing I just heard was what

sounded to me, anyway, like a very complicated process of jury instructions with, I guess, some sort of flow chart that says, if you find this and this, and you find this and this, then go to California, you already know, advance to jail, don't pass go -- don't -- I mean, it sounds like a very complicated arrangement, from my ear. Because when you're dealing with 33 states -- and these are not minor differences.

And the other thing to keep in mind is, we're not talking about what I suspect is the case in the case that he's talking about, which is one market. One market. Here, we have 11 different markets we. Have apparel. We have competitions, and maybe we'll have camps. So that's three. But then, as to camps and competitions, this is the way they define the markets, not us. They have five regional geographical ones.

So right off the bat, as things stand, the jury is going to have to think about 11 markets. And so, when they consider conduct and how effective prices in each of these markets, that's going to be a factor that they're going to have to be considering before they can get to the (mumbling). I don't mean to bring that up as a common issue, I

just need to bring that up as a distinguishing feature that you don't often see in these antitrust cases.

But moving on from there. The other thing that I found interesting was that they say, well, they filed a reply on class certification and they will explain all of this to the Court. Well, I would suggest to the Court, why didn't they explain this when they filed their motion for class certification? It seems like they've held this all back so that we don't even have a chance to respond to it, which I don't think they should be allowed to raise any of this on their reply. They should have presented to the court whatever their plan was, going in. And instead, it just said, it's all the same, don't worry about it. That was essentially, the sum and substance of what they said, when they cited a few cases I didn't get to.

So, in response what we did was we presented a chart that shows 10 pages of state law references, which is ECF 420 (5-1) and Page ID 1376. Start there. And among these many differences are, plaintiffs seek or pursue claims with a mix of allegations of, you know I don't accommodate conspiracy. But the laws of New York, California,

Tennessee, and Kansas, at least, did not provide a cause of action for unilateral conduct. If claims under those statements under the laws, including the claims on laws of states that do breach unilateral conduct, how would that work, thrown into the mix together.

The fact-finding for the jury would need to parse the alleged conduct between unilateral and non-unilateral, consider the case through both lenses, simultaneously. And I would submit that this is hard enough for antitrust lawyers to do. And I think, as a matter of fact, it would be impossible for a jury to do.

And then, of course, they would need to figure out, depending on where they came out on that, what that meant to damages. And there's other differences. For example, Mississippi law doesn't allow for claims in a robbery, unless there's a (mumbling) -- by transaction, only within the state of Mississippi .

So the fact finders are going to have to consider whether or not that's satisfied. And if it wasn't satisfied -- and you just heard he's not going to present a Mississippi case, so they're going to have to divide that with something. And

then they have to consider if it wasn't satisfied, what does that mean for (mumbling) --

A number of the states that they brought into play was 30-plus states: Arkansas; Connecticut; Florida; Idaho; Maryland; and Washington state do not apply -- do not provide a private antitrust cause of action for indirect purchasers, which is what they are. And so, therefore, they're relying on consumer protection statutes. And there's a case in the Sixth Circuit called Pilgrim 660 F.3d 943 from the Sixth Circuit itself, where they struck class allegations where the Court would need to apply the consumer protection laws of many states. So it's exactly the situation we're in.

THE COURT: Was this at the motion to dismiss stage?

MR. KAISER: It was a motion to strike, as I understand.

Just another example, the Tennessee Consumer Protection Law that we talked about a little bit earlier, I mentioned in passing, does not provide for antitrust-based claims at all. So that means that the Court's dismissal of those claims -- I mean, we suspect that means the Court will dismiss

those claims. But if it doesn't -- in other words, if the Court allows these claim drafts or all antitrust notes to go to the jury, the jury will have to simultaneously consider whether there was an antitrust violation for the other states, while at the same time, for TCPA purposes, considering whether there was some non-antitrust violation. We talked about deception and whatnot.

So those are two separate things that could actually come about simultaneously.

THE COURT: Let me stop you for a minute and ask you to -- I think part of the essence of Mr. Saveri's argument is this motion, although it's a Motion to Strike, it was essentially at the Motion to Dismiss stage, so it was filed -- I think it's -- the motion itself was filed April 15 of 2021, so, embarrassingly, two years ago, not on you-all's part, on my part, the embarrassing part. So it's a motion that's been hanging around for two years. It's essentially a motion based on the pleadings. Not essentially, it is. So you're pointing to positions and arguments that make it so that presenting this to a good jury will be difficult.

Mr. Saveri says, hey, let's wait. I'm going to tell you how we can get it to the jury. While it's not a completely satisfying answer,

because we're closer than we used to be. When I look at the timing of when this motion was filed, should I really be deciding, again, based on this motion, not a motion that might be ripe for a decision tomorrow, but based on this motion, should I really be deciding it based on whether it will be confusing to the jury or not or whether we could work it out and figure out what actually, ultimately gets to the jury through Motion for Summary Judgment and so forth.

MR. KAISER: Well, I understand the Court's point. I would say, though, that on this particular issue, just like in Pilgrim in the Sixth Circuit, there are issues of class certification that were just apparently the face of the complaint that do counsel for decision on that basis. And this is one of them. This is not a factual question. We're not arguing deep into the weeds of Daubert motions and different things that experts said. We're just talking about differences in state law, that the jury's going to have to hear a, you know, very long, apparently, charge on 33 different state laws. There are a bunch of issues that transcend different laws and then try to keep that all on their head and then deal with some sort of complicated jury form. Those are the realities. I mean, that's not us

talking, that's what we heard from this side today.

So that's what the Court's going to confront. It's in front of you today. It's going to confront whether the class certification briefing is done. It's going to confront it the day the jury is charged.

So the question is, wouldn't it make more sense if this is going to be a showstopper, as we certainly think it should be, as many courts have stated is.

Shouldn't we get there now so we can move on to whatever the next step in this case is, rather than have this be hanging out there as an issue that will have it's shadow of these proceedings from -- forever, until it gets --

THE COURT: I guess the question is, shall we deal with it now as opposed to, you know, in another round of briefing. And part of the answer from my perspective is whether -- when -- as litigators you look at all the different places in which you raise issues. Aren't some of these issues better raised at different points in the process?

You're right. It's purely -- well, part of it is purely legal. Some of the issues you raised as to individual states are legal issues.

But that's not the motion you made. You didn't say, let's spell out Mississippi because there's no proof as to anyone being harmed in Mississippi, or Mississippi doesn't allow purchasers, whatever the issue is. You said, let's throw out this whole class, because there's this problem in Mississippi.

So, help me get to -- and you're right. There are certain issues you do deal with -- that the Courts do deal with the stages. Absolutely appropriate to deal with at this stage. Tell me why this really is that kind of an issue.

MR. KAISER: Well, again, I think what it comes down to is that it is true, this was filed at the outset of the case. And the reason it was filed is because we looked at this class as suggested, which, again, involved at that point, three different products. And plus, by the way, they dispute the distinction between All Star and Scholastic, which I only bring up to say that's a whole other thing the jury is going to be thinking about. Big dispute in that area. So, if you think those are separate, those are multiplied a number of things, by two, which is All Star and Scholastic.

So, we looked at this and said there's no way this could possibly satisfy Rule 23 by its nature. And that was the purpose of the motion, was

to essentially avoid some of what we've been through over the last year and a half or two years.

Now, I understand what the Court is saying, which is, well, you've been through it, so that's a little bit of water under the bridge at this point.

THE COURT: No, no, no.

MR. KAISER: No, but I respect that kind of sense.

THE COURT: Yeah, but I really am not -- I'm not saying that. If it's right to throw it out, I'm not going to let it go in because you've done it anyway. That -- I want to be clear. That wouldn't be fair to you --

(Simultaneous, unreportable crosstalk.)

MR. KAISER: Okay. I didn't mean to suggest that -- I understand the point, though, when we're this far along. But we are where we were back then, which is, they brought a claim under -- I think it was 37, in the beginning. We've pointed out a couple things today. And we point out more in our briefing, as to problems that we'll make in this -- class. Therefore, no amount of discovery, no amount of fixing it can make it better. We've now had discovery and so forth, but that's kind of the best you can say, it's sort of a little bit beside

the point.

And now, they had their classification briefing. And even in that motion they filed, they still didn't bring forward a plan. All they said was more -- a bunch of courts have allowed stuff like this to go on. We have, of coursed, cited a bunch of other courts that have not allowed stuff like this to go on. And by the way, the cases we set are a lot more on point than the ones they said.

Now they say they're going to bring a whole other bunch of cases. And it just beg the question, when is there going to be finality in these things.

You know, we've brought this motion. We brought it. We think it's well-taken. The issues are not going to be any different on a class certification prospect than they are -- in that motion than they are in this motion.

That having being said, of course, if the Court is of the mind to say, I'd just rather do this in the context of the class certification decision, which I think we'll reach a more correct result, then I would say to the Court, go ahead. That should be what the Court does, as far as I'm concerned, because that is -- that's what the Courts

are going to do, which is going to be the right answer. I think it has what it needs before it to come to that right answer today. And it would certainly change the trajectory of this case in a way that I think is going to end up one way or the other anyway.

But as the decision maker, I have the utmost respect for your pride in deciding how -- where the point is you want to make this decision and what records you need. But I would submit to the Court that you have the records you've ever going to have in this: These differences, these charts, and so forth. They're going to submit something in a few weeks. But again, they've had their opportunity to do that. And here we are on their reply and they're saying they're going to raise all sorts of other things about how this could be done. Why didn't they do that on their initial filing? I don't understand that either.

So that would be my answer to that question.

THE COURT: And let -- I want to make sure I'm clear.

My goal here is really to put blinders on the fact that this case has had a whole lot more

happen in it since these motions were filed, because I think it's the defendant's right to have a decision on the Motion to Dismiss that they've filed, based on the way the law works as to motions to dismiss. So I'm not going to punt it because, while I could deal with this in another -- at another stage -- well, I'm only going to do that if it's the right thing to do as to the Motion to Dismiss.

Does that make sense?

MR. KAISER: That makes perfect sense. And I appreciate that. I'm very happy to hear that, because I think that's exactly right.

I would just say, though, that there's really nothing coming down the pike that's going to change the fact that they have 30-plus state laws. They have all these things that are really relevant to the facts as they have alleged them. And I don't think they're moving off of this allegation, unilateral versus bilateral, or unilateral versus conspiracy.

The statute of limitations being different for different states. There's a lot of statute of limitations issues, like the issue of Mississippi that we brought up, as an example.

The state-specific standards for damages -- some have heightened standards. Some have less-heightened, some are automatic. All of these things are going to come into play. And as the Court's sitting there just thinking ahead of, how am I going to manage a jury in this situation, how are we going to reach a fair result so the defendants have their right to defend themselves and don't get just swept along in a current, you know, it's all the same, don't worry about it or, the binary choice of, yes, they're bad, no, they're not bad, and then everything else just falls from that. That's why this shouldn't be allowed to go forward.

Rule 23 is not a default position. It is an exception to the rule as the Supreme Court has recently emphasized. And it's they're burden, of course, to show that they meet those requirements, that they didn't put forward in their complaint. And I would submit what they've said today just proves our point, which is, this is going to be awfully complicated, extremely complicated, unmanageable. And therefore, it is the time to sort of put a stop to this and move on to whatever's left in the case at that point.

I think that would be the fair and

applicable thing to do at this point.

THE COURT: Thank you, Mr. Kaiser?

Any response?

MR. SAVERI: So, just a couple of points.

I guess part of the -- what Mr. Kaiser continues to reiterate, to put it, I guess, charitably, is some version of a parade of horribles about how unmanageable the case will be.

What I would suggest, Your Honor, is -- and this will be shown in our brief. That multiple courts look at exactly these arguments and these concerns about manageability. And indeed, based on the evidence that we've already talked about, which is in the record in this case, found them wanton and found that they, yes, there are variations in state law. And depending on what the case is there could be 31 or 35 or 37 cases. That these issues can be appropriately and consistently and efficiently managed, pursuant to Rule 23, and that all parties can try this case to a jury in a trial that is fair to everyone, that is fair to the plaintiffs, that is fair to the defendants, and is fair to the system of justice that we have under Rule 23.

And I would just reiterate that the

opportunity to judge that is probably taken on a full record, based on the evidence in this case.

THE COURT: But what I just said to Mr. Kaiser is a little different than what you've just said. What I've just said to him is, look, at this stage I have to look at this motion to dismiss as if nothing else has happened in the case.

Surely you're not arguing that you didn't have some obligation to show this wasn't a fatal flaw that would -- that wouldn't support a Motion to Dismiss now, right?

MR. SAVERI: So, I agree. And I think your question was an apt question, which was, the motion was some version of, there was something so flawed, right? That was so inherently faulty, with respect to our complaint, with respect to the class action allegations, that's based purely on the pleadings and on the allegations that we made, and the reasonable inferences to which we are entitled, that it was so faulty that the Court can, at this juncture, or if we go back into a time machine to two years ago, say, stop. This is so flawed that you can not reasonably proceed. Okay?

So I accept that as the calculous. And I would say that they are showing in -- their arguments are themselves, fatally deficient.

I would also say, though, Your Honor, that I don't think you should neglect at this juncture, the fact that we have filed a -- we have opposed the Motion to Strike, but we've also filed a class certification motion, which brings to bear the evidence in everything we've learned. And so, I think that is instructive, and should be considered, don't think we need it. But I think the fact that we -- once given the discovery, once we've had an opportunity to develop our arguments, we're going to be able to carry our burden under Rule 23. And, you know, Rule 23 also doesn't require itself, to have these motions made, you know, at the end. They could be made earlier. It's always our burden. And we have sustained it.

The other thing I would guess -- I just want to point out, I didn't mean to say, and I don't think I did say, that we have somehow -- we're going to raise all of this stuff for the first time in the reply brief. We filed an opening brief. They have an opportunity to respond to it. They've opposed it and we have an opportunity to reply to that. And to the extent they've raised arguments, we're going to respond to that. I don't think that's a remarkable proposition. There's nothing unfair about that.

That's the way the rules work. And so, that's what we intended to.

The other thing I would say, Your Honor, is that a number of the arguments about particular state law that I heard from Mr. Kaiser a few minutes are basically their class certification opposition, I mean, it's basically a summary of the argument they're making in those briefs. We think that most of those issues, if not all of them, well, either they are not supported by the statute, or except they have an argument can be raised under Rule 56.

And the other thing I would point out, Your Honor, with respect to each of those issues, those are common issues, right. Those are common issues. They're saying there was some kind of legal bar to particular claims. We think it's a Rule 56 issue. And the resolution is going to be common. So, it just kind of adds another layer of predominance on a type of claim which courts have repeatedly found to be susceptible. Look --

THE COURT: So, well let me ask you. So, they're common as to certain -- of the states, right?

MR. SAVERI: Yes.

THE COURT: I guess that goes back to my question of subclasses and ...

MR. SAVERI: And, Your Honor, excuse me. If -- we believe there does not need to be a subclass. We don't believe it. We don't think that the proper procedure under Rule 23 is to create a bunch of subclasses, breaking this up into those pieces. We're intending on proceeding to prove all our claims, based on a common body of evidence.

The Courts that have dealt with these multistate claims ordinarily do not subclass. They make a decision under Rule 23, whether claims are up or down. Sometimes to be fair, courts will determine that there are certain state claims that won't go forward and could be kind of edited out or cleaved out of class certification. I really thing that's going to be the way it's going to be presented to Your Honor.

We don't think any of these claims will go, but you may disagree with us. And at that point maybe it will be subclasses, but for whatever it's worth, I've done dozens of these cases that we have just not subclassed. And that's just my experience. And I think it's been effective and fair to all the parties.

But, you know, ultimately, I'll maybe perhaps close with this. I think that the

defendant's argument is that instead of proceeding as a class, that we would have to proceed with a bunch of individual claims, perhaps, subclass claims. And I just think that's incorrect. I think it's inconsistent with Rule 23. I think it's inconsistent with basic principles of efficiency. I think a national class action where all these cases are tried at once. And you'll save -- we'll provide substantial justice and provide the parties resources. I think it makes sense to concentrate all of this in one proceeding.

So, unless the Court has additional questions, I'm prepared to sit down.

THE COURT: I think I am good.

Anything else, Mr. Kaiser?

MR. KAISER: I would only say that courts have looked at this argument that it's hard to -- it's frustrating when the claims are not that big. And the temptation, perhaps, is to do -- well, class action is the only way to go. But Rule 23 has requirements and those requirements have to be met. And the reason they have requirements is so that claims that don't belong together don't end up together, because it's prejudicial to defendants, as far as the due process rights.

So I would submit to the Court that just

like an -- of products, which is like -- they process their products, because we say, well, there were 21 states at issue and the Court denied class certification and indirect certification of class. That's what you have in here, ultimately. But for right now, the fact is that they have not shown how this is going to work. They have their -- they've had multiple opportunities to. What we've heard today is a very complicated scenario, I think, with involving the laws of 37 states. And what we said -- the right answer is Defendant's Motion to Strike and let the claims proceed however they proceed from there.

Thank you.

THE COURT: All right. Thank you, Mr. Kaiser.

That is all I have. I promise it won't be another two years before we rule. We'll rule as promptly as possible, but we'll take it under advisement.

Thank you-all -- yes, Mr. Saveri.

MR. SAVERI: Oh, I thought you were standing up, Your Honor. I was going to stand up as well.

THE COURT: Well, thank you. Give me one more minute.

I want to thank -- I guess -- I know

several of you-all are here from out of town. Thank you for making the trip. It really does help to have you here in person for something like this, as opposed to on Teams. So I appreciate you-all making the trip. And we'll see what happens next and whether we need this with some of the other arguments, going forward.

So, thank you-all. Have a good trip home. And we are in recess.

(WHEREUPON, the foregoing proceedings were ADJOURNED at 3:31 p.m.)

(Adjournment.)

C E R T I F I C A T E

I, April Lassiter-Benson, do hereby certify that the foregoing 101 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes in the matter of:

JESSICA JONES, ET AL.

vs.

BAIN CAPITAL PRIVATE EQUITY, ET AL.

Dated this 9th day of May, 2023.

S/APRIL LASSITER-BENSON
Official Court Reporter
United States District Court
Western District of Tennessee